United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2134

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
PAUL T. ROGERS,

Appellant,

-against-

J.J. NORTON, Superintendent,
Federal Correctional Facility,
Danbury, Connecticut;

PAUL REGAN, Chairman, New York
State Board of Parole; and

PETER PREISER, Commissioner of
Corrections, State of New York,

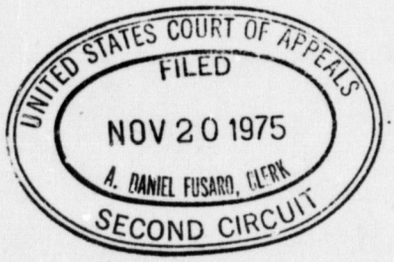
Appellees.

Docket No. 75-2134

B
P/S

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the District Court's denial of the petition because appellant's parole revocation hearing was not affected by the State's delay in holding the hearing was error, and the order of the district court must be reversed.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from an order of the United States District Court for the Southern District of New York (The Honorable Lawrence W. Pierce) rendered on July 10, 1975, denying without a hearing a pro se application pursuant to 28 U.S.C. §2241 for writ of habeas corpus.

On July 20, 1975, the District Court granted a certificate of probable cause and leave to appeal in forma pauperis.

By order dated October 17, 1975, this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel for Mr. Rogers on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Rogers pleaded guilty in the Supreme Court of the State of New York, New York County, to an indictment charging robbery in the first degree and lesser-included crimes. On June 17, 1968, he was sentenced to an indeterminate term, not to exceed ten years, for robbery. On June 21, 1971, he was released to the New York State Board of Parole* (Petition at 2-3).

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*His maximum expiration date was September 24, 1977.

On April 18, 1974, while appellant was on parole, Federal authorities arrested him for mail theft. On April 24, 1974, a State parole warrant was lodged against him (Petition at 3).

On June 13, 1974, appellant was declared delinquent* as of April 6, 1973 (State's Answer at 2).

On June 21, 1974, appellant pleaded guilty to possession of stolen mail (S.D.N.Y. 74 Cr. 450). A §4208(c) study was directed. While in custody for that study, appellant received notice that no action would be taken on revocation of parole until he was available for the New York State detainer (Petition pursuant to 28 U.S.C. §2241 in District of Connecticut, attached as C to the petition in this case.

On October 23, 1974, appellant was sentenced to a term of eighteen months in prison. At the sentencing proceeding the Assistant U.S. Attorney advised appellant and defense counsel that the State warrant would affect the type of program in which appellant might participate while incarcerated, and that it would be beneficial to get a determination of the status of the warrant (Petition for writ of habeas corpus attached as A to the petition in this case).

On October 31, 1974, appellant applied to the New York State Board of Parole for a revocation hearing. The same

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* It is the declaration of delinquency by the State rather than the issuance of the warrant which stops the running of the sentence. N. Y. Penal Law §70.40.

request was also made by appellant's counsel. On November 19, 1974, the requests were denied in a letter stating that a hearing would not be held "until you are available to our warrant ... because the Board of Parole does not hold hearings in State cases except at State correctional facilities" (Petition pursuant to 28 U.S.C. §2241 in District of Connecticut attached as C to petition in this case).

On December 3, 1974, appellant filed a petition for writ of habeas corpus in the Supreme Court of the State of New York, New York County, asking that the detainer be declared void. In his petition appellant alleged that, with accumulated pretrial jail time, he had nine months remaining to serve and that prisoners with nine months of custody can participate in out-of-prison activities such as furloughs and work and education release programs, but that the parole warrant precluded such participation by him. In response, the State argued that it had no power over appellant because he was in the custody of another jurisdiction and therefore no parole revocation hearing could be held anywhere. The Supreme Court found the delay unreasonable but instead of vacating the warrant, on December 20, 1974, the Court ordered the Parole Board to hold a hearing within thirty days.*

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*Annexed as "E" to appellant's separate appendix.

On January 9, 1974, appellant filed a petition for writ of habeas corpus in the United States District Court for the District of Connecticut, seeking vacature of the warrant and urging that a hearing after nine months could not cure the State's delay. In his petition to the Connecticut District Court, appellant stated:

> In the case at bar petitioner has some 5 months left to serve on his Federal sentence before he is released (see official Time Computation, annexed as Exhibit "I"). At this time, because of the pendancy [sic] of the parole warrant petitioner is barred from participation in programs which would, as a matter of course, be available to him in terms of a rehabilitative process. Such programs include: Minimum security classification; work release; furloughs; transfer to community treatment facility. Not to speak of the mental anguish involved in the uncertainty with which petitioner faces the future. Such uncertainty about the date of freedom magnifies inmate frustration and inhibits the rehabilitative process (c.f. Attica: The Official Report of the New York State Special Commission on Attica).
> The failure of the New York State Board of Parole to conduct a revocation hearing cannot be cured at this date and, the petitioner being prejudiced, is entitled to have the warrant withdrawn with prejudice.

In the interim, on January 28, 1975, a parole revocation hearing was held before the New York State Board of Parole. The Board revoked appellant's parole. Pre-release consideration was put over for consideration until appellant's return to State custody (Minutes of Parole Revocation Hearing, appended to Respondent's Answer). The minutes of the hearing show that appellant presented evidence in mitigation, that he

advised the State Board that his Federal parole release date would be affected by the Board's decision. A hearing commissioner stated that they would not release him because of the new crime notwithstanding mitigating evidence. The decision of the Board indicated that no re-parole date would be set because the federal release date was uncertain (Minutes of hearing attached to State's answer to the petition in this case, Record on Appeal, Document #6).

On January 29, 1975, the United States District Court for the District of Connecticut declined jurisdiction over the proceeding, incorrectly asserting that appellant did not allege that the detainer adversely affected his conditions of confinement, and suggesting that appellant bring his suit in the district from which the warrant was issued.*

By petition dated February 6, 1975, and not filed in the United States District Court for the Southern District of New York until March 7, 1975, appellant sought immediate release on parole because of the undue delay in giving him a hearing.

Judge Pierce directed a response to the petition by March 27, 1975. In the absence of such response, appellant filed a motion for summary judgment. The State was then granted an extension to April 25, 1975, within which to file its response.

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*The opinion of the Connecticut District Court is annexed as "F" to appellant's separate appendix.

In response to the petition the Attorney General argued that appellant had not exhausted his State remedies and that he was entitled to no relief because he had received a fair parole hearing.

With respect to the issue of exhaustion, appellant responded by reference to his earlier application to the Connecticut District Court, asserting that if he exhausted his State remedies by appealing the order of the State Supreme Court, the process would have taken too long for him to derive any benefit from a favorable decision.

Judge Pierce referred the case to Magistrate Jacobs for consideration. In his memorandum,* Magistrate Jacobs found:

> [The] decision [ordering a parole hearing] was eight months after the filing of the detainer warrant and the scheduled hearing held on January 28, 1975 was nine months after arrest. In his petition before the New York Supreme Court petitioner stated that he then had about nine months to serve on the federal sentence and "the pendency of the parole detainer severely limited the type of rehabilitative programs in which the petitioner might engage while in federal custody" and would normally be eligible for a variety of programs including change of custody, work release, furloughs, transfer to a Community Treatment Facility, and educational programs outside the place of confinement....

On the question of exhaustion, the Magistrate concluded:

> In his petition before the Federal Court in Connecticut [petitioner] urged (p.9) that the normal appellate process was about 10 months and since he then had only five months to serve the issue might become moot and thus the Court should exercise jurisdiction. The matter of exhaustion was reviewed at length

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*The memorandum of Magistrate Jacobs is annexed as "B" to appellant's separate appendix.

> by the Supreme Court in Preiser v. Rodriguez, 411 U.S. 475 (1973) where the Court stated that "the rule of exhaustion is rooted in consideration of federal-state comity" (p.491) and that "... if the prisoner could make out a showing that, because of the time factor, his otherwise adequate state remedy would be inadequate, a federal court might entertain his habeas corpus immediately" since under the language of §2254(b) there exist "circumstances rendering such (state) process ineffective to protect the rights of the prisoner" (p.497). Under the usual circumstances here present it is believed that the Court should not decline jurisdiction.

On the question of whether the delay required dismissal of the detainer, the Magistrate cited United States ex rel. Buono v. Kenton, 287 F.2d 534 (2d Cir.), cert. denied, 368 U.S. 846 (1961), and United States ex rel. Blassingame v. Gengler, 502 F.2d 1388 (2d Cir. 1974), and concluded:

> In view of the decisions in this circuit that the failure to have a reasonably prompt hearing is cured by a later fair revocation hearing the petition must be denied. Here there was a fair hearing at which petitioner admitted the parole violations and there was no prejudice in the conduct of the hearing or any possible basis for inferring that an earlier hearing and determination might have been favorable to petitioner.

The Magistrate acknowledged, however, that other Circuits do not follow this rule.

Judge Pierce adopted the decision of the Magistrate on the merits, finding that the delay was unreasonable, but that there was no prejudice at the hearing.*

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*Judge Pierce's memorandum and order is annexed as "C" to appellant's separate appendix.

The District Court granted a certificate of probable cause.

Appellant is now in State custody, having been turned over to State authorities on June 4, 1975.

ARGUMENT

THE DISTRICT COURT'S DENIAL OF THE PETITION BECAUSE APPELLANT'S PAROLE REVOCATION HEARING WAS NOT AFFECTED BY THE STATE'S DELAY IN HOLDING THE HEARING WAS ERROR, AND THE ORDER OF THE DISTRICT COURT MUST BE REVERSED.

The District Court denied appellant's request that the parole violation warrant and detainer filed against him be dismissed and that he be re-paroled. The decision was based on this Court's decision in United States ex rel. Blassingame v. Gengler, 509 F.2d 1388 (2d Cir. 1972). Blassingame was said to require denial of relief even though a parole revocation hearing is delayed for an unreasonable period if the hearing itself was a fair one. However, the District Court's application of Blassingame to this case, and in fact to any case but one with facts identical to Blassingame, is improper. A review of the factual distinctions between Blassingame and the instant case, and of the relevant and current case law applicable to the two sets of facts, will more than demonstrate the error of the court below.*

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*Reliance on United States ex rel. Buono v. Kenton, 287 F.2d 534 (2d Cir. 1961), is also unjustified. The facts in Buono, like Blassingame, demonstrated no prejudice; thus, this Court's view was limited to the fairness of the hearing. As will be shown, infra, at 24-26, the hearing which was provided here was unfair.

Blassingame was convicted in the Southern District of New York, sentenced, and released on parole. Subsequently a parole violation warrant was issued by the Federal Parole Board charging six violations -- five technical violations and one arrest for another crime.* Blassingame was arrested on July 2, 1973, in Florida, on the Federal parole warrant, and a hearing was ultimately held in New York on March 26, 1974. At that hearing Blassingame was represented by counsel, admitted five of the technical violations, and called no witnesses with respect to the ultimate disposition of the charges. Parole was revoked and Blassingame was returned to custody for service of his maximum sentence.

Almost four months of the almost nine months between arrest on July 2, 1973, and the hearing held on October 31, 1973, resulted from an adjournment to enable Blassingame to obtain counsel, a defense-requested psychiatric examination, and the transfer of Blassingame to the Federal Medical Center in Springfield, Missouri. The remaining five-month delay was caused by a series of procedural and administrative mishaps in scheduling the hearing and the refusal of Blassingame to attend one scheduled hearing.

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*Three of the technical violations were added in two amendments to the warrant.

Contrasted to Blassingame's situation is appellant's. A parole violation warrant was lodged by New York State officials after appellant was in Federal custody on another charge. A request to the New York State Board of Parole for a hearing was made by appellant so as to dispose of the detainer to prevent prejudice by preclusion from rehabilitative and other programs offered in the Federal institution.* The New York Board denied such a hearing, reflecting its policy not to hold hearings except at State correctional institutions. Appellant then sought a dismissal of the detainer in the State courts, alleging a prejudicial effect on the conditions of his confinement. The State court found the delay unreasonable and ordered a parole violation hearing. A hearing was finally held some nine months after appellant's arrest while a petition for writ of habeas corpus was pending in the District of Connecticut.

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*Indeed, the petition asserts that the Assistant U.S. Attorney himself suggested that appellant seek a disposition.

The difference between Blassingame's situation and appellant's is readily apparent: Appellant alleges that the delay in the New York hearing prejudiced him by worsening the conditions of his confinement in a Federal institution, that his opportunity for parole in the Federal jurisdiction was endangered, that his opportunity to continue service of his New York sentence was denied, and that the entire delay was caused by a continuing practice by the New York State Board of Parole which was violative of §212 of the New York State Correction Law. On the other hand, Blassingame's delay occurred while he was in the custody of the jurisdiction which issued the detainer, to which he owed time for parole violation for that very crime. Blassingame made no claim of suffering an adverse change in conditions of confinement or loss of sentence credit.

Thus, appellant claims prejudice, whereas Blassingame alleged none, and this Court found none in his parole violation hearing. The opinion in Blassingame properly confines itself to examining the effects of the delay at the subsequent parole violation hearing in a fact pattern where that was the only potential point of prejudice. This case, however, where other kinds of prejudice have been alleged, falls within the purview of the progeny of Smith v. Hooey, 393 U.S. 374 (1969), which examines the totality of the prejudice caused by the unreasonable delay. Smith acknowledges that a prisoner of one jurisdiction who has lodged against him a detainer from another

jurisdiction may be prejudiced by a delay in resolving the status of that detainer:

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.
>
> And while it might be argued that a person already in prison would be less likely than others to be affected by "anxiety and concern accompanying public accusation," there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large.
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> Smith v. Hooey, supra, 393 U.S. at 378-379. Footnotes omitted.

See Dickey v. Florida, 398 U.S. 30 (1970); Strunk v. United States, 412 U.S. 434, 439 (1973).

Indeed, Congress has itself recognized the adverse impact of detainers by becoming a party to the Interstate Agreement on Detainers (18 U.S.C.App.§2). As the statute itself states:

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or

> complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints.
>
> (Art. I).

See also 1970 U.S. Cong. & Admin. News, 4863-4866.

The combined message of Smith v. Hooey, supra, and Morrissey v. Brewer, 408 U.S. 471 (1972), applying due process standards to parole violation proceedings, is that prompt disposition of parole violation detainers is constitutionally required.

Under Morrissey, parole violation procedure has two functions -- determination of violation and disposition:

> If it is determined that the parolee did violate the conditions ..., the second question arise[s]: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second step is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual, but also predictive and discretionary.

* * *

> The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.
>
> Morrissey v. Brewer, supra, 408 U.S. at 480, 483.

The opportunity to present mitigating circumstances and to affect the decision of the Board is part of the due process afforded to parolees (Preston v. Priggman, 496 F.2d 270 (6th Cir. 1974); Caton v. Smith, 486 F.2d 733 (7th Cir. 1973); Cooper v. Lockhart, 489 F.2d 308, 315-316 (8th Cir. 1973)). In the face of this view of the purpose of the parole violation hearing, a Parole Board cannot delay the revocation hearing until the completion of the intervening criminal sentence. United States ex rel. Hahn v. Revis, Doc. No. 74-1057 (7th Cir., July 25, 1975); Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975); Cooper v. Lockart, 489 F.2d 308, 312-313 (8th Cir. 1973); Arnold v. United States Board of Parole, 390 F.Supp. 1177 (D.D.C. 1975); Fitzgerald v. Sigler, 372 F.Supp. 889 (D.D.C. 1974), appeal pending, D.C. Cir. Doc. No. 74-1517); Pavia v. Hogan, 386 F.Supp. (N.D.Ga. 1974);* Morden v. United States Board of Parole, 376 F.Supp. 226 (W.D.Mo. 1974); Jones v. Johnston, 368 F.Supp. 571 (D.D.C. 1974); Sutherland v. District of Columbia Board of Parole, 366

Pavia represents one side of a dispute going on in the Fifth Circuit. See discussion infra at 20, fn..

F.Supp. 571 (D.D.C. 1974); United States ex rel. Hitchcock v. Kenton, 256 F.Supp. 296 (D.Conn. 1966); Jenkins v. United States, 337 F.Supp. 1368 (D.Conn. 1972).

In Cooper v. Lockhart, supra, the Court of Appeals expressed the principle with clarity:

> It has been urged that the possible loss of individual liberty, which was the focal thrust of Morrissey, is not present in a detainer situation because the individual is already incarcerated. In other words, regardless of any favorable decision as to the parole revocation, that decision cannot affect the present confinement. This argument, we think, violates the intended spirit of Morrissey and the later decision of Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973).
>
> The Supreme Court has observed:
>
> "Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions.... And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness."
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> * * *
>
> This possibility is just as much obscured and "forever lost" if a parole revocation hearing is postponed.
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> * * *
>
> It is possible to argue (1) that a revocation hearing is needless since in most every case the detainer request will be placed because the petitioner has violated his parole through conviction of another felony....

> [This] consideration could be a real one, if it were a foregone conclusion that revocation and reincarceration would always result. However, this is not so. There are many possible alternatives. First, notwithstanding the conviction in another state, the Board of Parole may well waive revocation. This often occurs today but the decision to waive revocation is not decided until the prisoner is about to be released by the detainer state. The result is that because of the detainer, the prisoner is released without having been given the opportunity for rehabilitation in prison.
>
> Second, the argument that parole revocation and imprisonment will authomatically follow upon release overlooks the concern of the Supreme Court "that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving...."
>
> Cooper v. Lockhart, supra, 489 U.S. at 314-316. Emphasis in the original.

In this Circuit, the Connecticut District Court has been equally conscious of the right of the rights of the parolee:

> [The] petitioner's admission of violation [is not] an extenuating circumstance which, as the respondent argues, excuses the delay. Whether or not there has been a transgression is only the first of two decisions which must be reached following a [final] hearing. Loss of parole status and reincarceration are not automatic consequences of parole infraction. The statute also requires the Board to determine whether the violator is still a good parole risk. A breach of the release conditions is but one element, albeit often a forceful one, to be considered. The parolee may bring other factors to the attention of the Board which may induce it to give him another chance. [Citations omitted].
>
> An accused violator, therefore, should be presented within a reasonable time not

> only to respond to the charges against him, United States ex rel. McCreary v. Kenton, 190 F.Supp. 689, 691 (D.Conn. 1960), but also to attempt to convince the Board that, notwithstanding the violation, his parole should be continued under the same or some other terms and conditions. Months of incarceration prior to the hearing, in addition to being fundamentally unfair, effectively nullify this opportunity.
>
> United States ex rel. Vance v. Kenton, 252 F.Supp. 344 (D.Conn. 1966).

In Hahn, supra, the court described five potential prejudices resulting from a delayed hearing: loss of prison privileges due to the detainer; diminished chances for parole from the jurisdiction in actual custody; impairment of rehabilitation; loss of opportunity to present mitigating circumstances; and total longer confinement because of loss of concurrency. New York law, statutes and judicial precedents, takes a common view. In Donohoe v. Montanye, 35 N.Y.2d 619 (1974), the New York Court of Appeals, holding there was a right to counsel at revocation hearings even for parolees convicted of new crimes, explained the significance of a hearing:

> That a parolee has been convicted of a crime presumably committed while on parole is not persuasive to deny counsel at a final revocation hearing. Revocation is not automatic and rests in the discretion of the Parole Board (Correction Law, Consol. Laws, c.43, §212, subd. 7; see, also, §210). The offense committed or the circumstances, including the facts which may have induced a plea to a lesser offense, surrounding the crime may be such that counsel by offering testimony or effective reasoning might persuade the board not to revoke parole. Moreover, the Parole Board must also fix the

> period of time which must elapse, up to 24 months, before the prisoner may be again considered for parole (Correction Law, §212, subd. 3). Finally, in situations involving more than one ground for declaring delinquency the board has the power to determine the date of delinquency, from which service of sentence in prison is measured. The later the date fixed, the greater the credit toward time served on the sentence (see Penal Law, Consol. Laws, c.40, §70.40, subd. 3, par.[a]). In each of these instances, effective counsel may be able to obtain more favorable treatment for the parolee.
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> Id., 35 N.Y.2d at 622.*

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*The Circuits rejecting the principles developed herein do so for varying reasons. The Fifth Circuit (Trimmings v. Henderson, 498 F.2d 86 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975); Burnett v. United States Board of Parole, 491 F.2d 967 (5th Cir. 1974); Cook v. Attorney General, 488 F.2d 667 (5th Cir. 1974)), dealing with the failure of the Federal Parole Board to resolve their detainers, takes the very technical position that under the Federal statute a hearing constitutes "execution" of the parole violation warrant and that the execution re-activates the running of the sentence. This is said to deny the Parole Board its discretion to decide who will get concurrent sentences. Thus, it says that Morrissey does not apply because it, the Board, has no power to give a hearing. The District Courts of the Fifth Circuit are divided, with Parria, supra, refusing to follow Cook and Burnett because of the conflict with Morrissey and Wolff v. McDonnell, 418 U.S. 539 (1974), while Gray v. Hogan, 388 F.Supp. 476 (N.D.Ga. 1975), adheres to the prior Fifth Circuit decisions.

The Third Circuit, in an unreported decision, Orr v. Saxbe, Doc. No. 75-1042 (June 10, 1975), adopted without opinion the decision of the District Court in that case (Civ. No. 74-341). That opinion held that there was no prejudice in delaying a Federal parole hearing until after service of a state sentence because if the Federal Board feels that a concurrent sentence is appropriate, it can effectuate the same result by shortening the time to be served on the unexpired term. This decision is beside the point -- the Board cannot shorten the total sentence imposed upon the prisoner. Thus, while the length of time in prison can be adjusted, the prisoner is still subject to the full term of his sentence, albeit in parole custody subject to parole

Appellant's petition in this case, as well as those in the prior proceedings, make valid claims of prejudice with respect to the condition of his confinement, raising matters which were not the subject of any inquiry by either the District Court or the Magistrate. The loss of furloughs or work and education release programs represent the loss of substantial rights. Cardaropoli v. Norton, Doc. No. 75-2005, slip opinion 75, 82-93 (2d Cir., September 29, 1975), and cases cited supra at

Further, it is probable that the delayed hearing and resolution of the status of the State detainer, as well as the failure of the Parole Board to render any disposition after the hearing held,* affected appellant's Federal release

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(Footnote continued from the preceding page)

limitations. Concurrent terms would, in fact, not abbreviate the total time he is in control of either the prison officials or the Parole Board. Denying him the right to shorten that period is the prejudice.

The Tenth Circuit has held that it is permissible to delay executing the detainer and thus to delay a hearing, but that Court looks to ascertain whether prejudice resulted from the delay to determine whether a remedy should result. Small v. Britton, 500 F.2d 299 (10th Cir. 1974).

The Fourth Circuit has taken the position that historically there are accepted bases for delaying the execution of a detainer, including service of an intervening sentence; that a delay is in reality a benefit to the parole violator who can build up a good prison record; and that the loss of the opportunity to have concurrent sentences imposed and to participate in prison programs is not prejudicial. Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975).

*See infra at 25.

date. He was sentenced under 18 U.S.C. §4208(a), and thus was immediately eligible for Federal parole. If the Federal authorities had been certain of State parole status, it might have resulted in an earlier Federal release date.

Moreover, as the New York Court of Appeals noted in Donohoe v. Montanye, supra, the State Parole Board does have discretion after a final hearing to revoke parole and release the parolee on parole, or even to dismiss a declaration of delinquency.* New York Correction Law §212(7); 7 N.Y.C.R.R. §1925.35(k);** People ex rel. Alston v. Superintendent, Sup. Ct., Dutchess County, October 17, 1975.***

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*Under Corrections Law §212(7), the Board declares a parolee delinquent if there is reasonable cause to believe there has been a violation of parole conditions. Under New York Penal Law §70.40(3), the declaration interrupts the running of the sentence. That declaration can be made to take effect retroactively to the date of the alleged violation.

**Under the Board's rules, a person convicted of a new crime is not entitled to a final parole revocation hearing and revocation is automatic. 7 N.Y.C.R.R. §1920.20(b), (c). This section has implicitly invalidated Donohoe v. Montanye, supra, which held that the right to counsel applies at parole violation hearings for a parolee convicted of another crime. Thus, a fortiori, a hearing must be given and the permissible dispositions considered. The regulations of the Board of Parole are annexed as "G" to appellant's separate appendix.

***A copy of the opinion is annexed as "H" to appellant's separate appendix.

In response to appellant's petition for writ of habeas corpus in the State courts, the State indicated that its reason for refusing to grant a parole revocation hearing was that the Board did not have jurisdiction over appellant, who was then in Federal custody in a Federal detention facility. To support its position the State looked to Penal Law §70.40 (3), which states that State prison time shall begin to run again from the date of the return of the parole violator to an institution under the jurisdiction of the New York State Department of Correction. The courts of New York have rejected this reason, holding that the hearing must be given promptly, that there are procedures available to do so, and that §70.40 applies only to computation of sentence. Allah v. Warden, 47 A.D.2d 485 (1st Dept. 1975); McNair v. Warren, 77 N2d 150 (Sup.Ct., Kings County), affirmed without opinion, 46 A.D.2d 741 (2d Dept. 1974); Wright v. Regan, 46 A.D.2d 163 (45h Dept. 1974); McLucas v. Oswald, 40 A.D.2d 311 (3d Dept. 1974), appeal dismissed, 32 N.Y.2d 761 (1974).* Thus, the State's reason for its refusal to grant the hearing was an improper one and cannot justify the delay. Smith v. Hooey, supra.

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*Mullins v. Board of Parole, 43 A.D.2d 382 (2d Dept. 1974), limits McLucas, but, in light of Donohue v. Montanye, supra, Mullins' validity is questionable.

The parole violation hearing held in this case pursuant to the order of the State Supreme Court demonstrates that the only appropriate relief to cure the unreasonable delay and its effects in this case is the issuance of the writ. At the hearing appellant admitted the violation (the Federal crime), but then presented factors in mitigation relating to both the crime and his general behavior. Appellant next explained that he was advised by his Federal caseworker that if the State Parole Board reinstated him to parole, the Federal authorities would plan to release him to a community treatment center or halfway house (Minutes of Parole Revocation proceeding at 13, attached to State's Answer to the Petition, Document #6 to the Record on Appeal). Appellant explained the alternative possible release dates from Federal custody:

> ... The sentence, the eighteen months itself, is up some time in November. The maximum expiration date with good time is July 2, 1975. If I were to be transferred to a CTC, that would be effectuated some time in March, so as to how anywhere from three to six months in the CTC program --
>
> Id. at 14.

During appellant's presentation, one of the Commissioners stated:

> ... Not only can we not grant parole release to anybody under sentence, but this is even a little [--] the gravity is a little greater in your case where you're under sentence of another jurisdiction.
>
> Id. at 15.

The Board's decision was to revoke, but it made no decision as to disposition such as re-parole, ostensibly because of "the severa' variances in which [appellant's] release from the Federal authorities would take place."

Thus, contrary to its legislative mandate, the Board announced prior to its decision that it would not consider the mitigating evicence because it would not re-parole or lift the detainer. Further, even its articulated decision was based not on appellant's behavior but on the lack of a Federal decision, although the Board was told that Federal officers believed appellant could leave the Federal facility and that they would allow release to the community if the State authorities granted parole. Indeed, it is probable that the delay in the Board's decision resulted in appellant's detention in Federal custody until June 4, 1975, without release to a community project. The effect was to prolong his detention by three months.

The hearing could not terminate appellant's right to have the full relief to which he was entitled where the delay of the State Parole Board in granting it produced prejudice to the conditions of appellant's confinement. It is now clear that the speedy disposition issue survives the conclusion of the proceeding which was delayed and that relief on the speedy disposition issue is available. Strunk v. United States, 412 U.S. 434 (1973).* Further, the context of the hearing itself,

*To the extent that Buono is to the contrary, it is overruled.

as described above, demonstrates that appropriate relief, even after the nine-month delay was terminated only by court order, was dismissal of the detainer.

Recognizing the need for a speedy resolution of the issues affecting his one-year term of Federal imprisonment and his chances for immediate release on Federal parole, appellant,immediately after the State Supreme Court's order, properly sought relief in the District Court for the District of Connecticut. He alleged an adverse effect on the conditions of his confinement and his Federal parole status by the presence of the detainer which the Board had refused to process, and he sought its withdrawal. Nelson v. George, 399 U.S. 224 (1970);* Wingo v. Ciccone, 407 F.2d 354 (8th Cir. 1974); Mattingly v. Ciccone, 503 F.2d 503 (8th Cir. 1974); McEachern v. Henderson, 485 F.2d 694 (5th Cir. 1973).

The District Judge inexplicably found that appellant made no assertions with respect to his confinement, and advised him to seek relief in the District from which the parole warrant originated. Heeding that advice, appellant filed the present petition seeking his release on parole.

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*In Nelson, a North Carolina detainer was lodged in California. The Supreme Court held that the petition could attack the North Carolina detainer in the California State courts, and if they granted no relief, that petitioner could come into California Federal courts. Here, of course, the detainer was lodged with a Federal prison, and the Federal courts were the proper first courts.

Appellant's failure to appeal the order of the State court to the State appellate courts* was necessitated by the speed with which he had to try to get the matter of the detainer resolved. An appeal to the Appellate Division and the Court of Appeals challenging the relief given him by the lower court would have taken several months. Appellant alleges without contradiction that it would have taken five months. By the time the appeal was completed, he would have been unavailable to derive any beneficial effect from even a favorable result because his Federal sentence would be nearing its end and the prejudice resulting from the detainer would have become irremediable. United States ex rel. Goodman v. Kehl, 456 F.2d 863, 869 (2d Cir. 1972); United States ex rel. Shaban v. Essen, 386 F.Supp. 1042 (E.D.N.Y. 1974). In this context, appellant properly sought relief in the District of Connecticut, Nelson v. George, supra, and was wrongly denied relief there. Pursuant to that court's suggestion, he promptly filed his petition in the Southern District of New York** where he can properly challenge the State's proceedings both because he has no currently available State remedies and because he raises a constitutional due process question.

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*This is now not an exhaustion issue (Fay v. Noia, 372 U.S. 391 (1965)), but one of deliberate by-pass.

**The petition was dated February 6, 1975, eight days after the Connecticut order, but was not filed by the Clerk of the Southern District until March 7, 1975; no response was filed until May 25, 1975.

CONCLUSION

For the above-stated reasons, the order of the District Court should be reversed and the writ issued.

Respectfully submitted,

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Certificate of Service

NOV 20, 1975

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Robert Abel Bamberger